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IN THE SUPREME COURT OF THE UNITED STATES

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

ANGEL MCCLARY RAICH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Charles Fried
David L. Shapiro
1575 Massachusetts Ave.
Cambridge, MA 02138

Steven G. Calabresi
357 E. Chicago Avenue
Chicago, IL 60611

Ilya Somin
3301 North Fairfax Dr.
Arlington, VA 22201

Douglas Laycock
Ernest A. Young
Counsel of Record
727 E. Dean Keeton St.
Austin, TX 78705
(512) 232-5561

Matthew D. Schnall
Rachel H. Sommovilla
Bingham McCutchen LLP
150 Federal St.
Boston, MA 02110-1726

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Question Presented

Whether the Controlled Substances Act, 21 U.S.C. §801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the intrastate possession and manufacture of cannabis for personal medical use.

TABLE OF CONTENTS

Interest of the Amici Curiae 1

Summary of Argument 2

Argument 4

I. This Court should enforce limits on national authority under the Commerce Clause 4

A. Cases concerning the limits of Congress's enumerated powers should not be left exclusively to the "political safeguards of federalism." 5

B. Constitutional courts in federal systems around the world decide cases concerning the allocation of authority between the national and sub-national authorities. 9

II. Properly defined, the regulated activity in this case is not commercial in nature. 10

A. The correct analysis focuses on the specific activity before the Court in a particular case. 12

B. Medical uses of drugs are sufficiently distinct from non-medical ones to require separate analysis under the Commerce Clause. 16

III. Regulation of medical cannabis is not "an essential part of a larger regulation of economic activity." 22

A. The "comprehensive scheme" exception must be narrowly construed 22

B. This Court should reject the "comprehensive scheme" argument in this case because it does not reflect Congress's own judgment and because it lacks an adequate foundation in the record. 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

Amax Potash Ltd. v. Saskatchewan, 2 SCR 576 (1976) 10
Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 28
Baker v. Carr, 369 U.S.186 (1962).....8
Bowers v. Hardwick, 478 U.S. 186 (1986) 14
Case C-376/98, Germany v. Parliament and Council (Tobacco Advertising), 2000 E.C.R. I-8419, [2000] C.M.L.R. 1175 (2000) 9
Clinton v. City of New York, 524 U.S. 417 (1998) 8
Ex Parte Boilermakers' Soc'y of Australia, 94 CLR 254 (1956).....10
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 8
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).....5, 19
Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824).....6
Gregory v. Ashcroft, 501 U.S. 452 (1991).....19, 20, 21
Lawrence v. Texas, 539 U.S. 558 (2003).....8
McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819) 8, 25, 26
Michael H. v. Gerald D., 491 U.S. 110 (1989).....14
Parker v. Brown, 317 U.S. 341 (1943) 19
Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....19
Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).....12, 17
Re Wakim, 198 CLR 511 (1999).....10
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 20
Shreveport Rate Cases, 234 U.S. 342 (1914) 22
Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 25
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).....7
United States v. Bass, 404 U.S. 336 (1971).....19
United States v. Darby, 312 U.S. 100 (1941) 25
United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003).....21
United States v. Morrison, 529 U.S. 598 (2000) ..... *passim*
United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483 (2001).....20
United States v. Raines, 362 U.S. 17 (1960).....15
United States v. Salerno, 481 U.S. 739 (1987) 14
Washington v. Glucksberg, 521 U.S. 702 (1997) 8, 20
Wickard v. Filburn 317 U.S. 111 (1942) 3, 11, 12, 13, 15, 27
Will v. Mich. Dept. of State Police, 491 U.S. 58 (1989).....19

Statutes

18 U.S.C. § 2252(a)(4)(B) 21
1964 Civil Rights Act, 42 U.S.C. § 2000(e).....24, 25
21 C.F.R. §§ 1301-1306 (2004).....17
Controlled Substances Act, 21 U.S.C. 801 *et seq.* ..... *passim*
Equal Pay Act, 29 U.S.C. § 206(d).....25
Family Medical Leave Act, 29 U.S.C. § 2601 25
Gun Free School Zones Act, 18 U.S.C. § 922(q) 24
Violence Against Women Act, 42 U.S.C. § 139817 .....24, 25

Other Authorities

Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).....7
Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347 (1997).....7
Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).....4, 6
Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990) 9

Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) 6
Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) 7
Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) 6, 7
Markus Rau, *Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the* Geriatric Nursing Act *Case*, 4 GERMAN L. 223 (2003) 10
Martin Shapiro, *The European Court of Justice*, in THE EVOLUTION OF EU LAW 321 (Paul Craig & Grainne de Burca eds., 1999) 9
Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) 6
Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541 (2002) 21
The Federalist No. 45 (James Madison) (Clinton Rossiter, ed., 1961) 5, 6
The Federalist No. 46 (James Madison) (Clinton Rossiter, ed., 1961) 5
The Federalist No. 84 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) 28
Vicki Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 HARV. L. REV. 2180 (1998) 8, 9

Interest of the Amici Curiae

Amici are scholars who teach and write about constitutional law, with a particular interest in constitutional federalism.[1] Steven Calabresi is George C. Dix Professor of Constitutional Law at Northwestern University School of Law, where he also teaches Comparative Law. Charles Fried is Beneficial Professor of Law at Harvard Law School, where he teaches Constitutional Law. Douglas Laycock is Alice McKean Young Regents Chair in Law at the University of Texas at Austin, where he teaches Constitutional Law. David Shapiro is William Nelson Cromwell Professor of Law at Harvard Law School, where he teaches Federal Courts. Ilya Somin is Assistant Professor of Law at George Mason University School of Law, where he teaches Constitutional Law. Ernest A. Young is Judge Benjamin H. Powell Professor of Law at the University of Texas at Austin, where he teaches Constitutional Law and Federal Courts. Each of us has written extensively about federalism.[2]

The signatories of this brief represent a wide variety of perspectives on what Congress may do under the Commerce Clause. But we all agree that some activities must be beyond the reach of the commerce power, and that the Government's position here is inconsistent with that structural limit. If Congress can regulate

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk.

[2] We file this brief in our personal capacities as scholars; none of our respective universities takes any position on the issues in this case. We emphasize that each of the *amici* signing this brief has participated in the drafting of it. This is not always the case with academic briefs.

household production for household consumption, then the Commerce Clause can reach the most intimate human relationships and activities. Despite widespread disagreements in the academy about the contours of federalism doctrine, scholars from many perspectives can agree that *this* case involves an undue extension of federal authority. And we can agree on an approach to the Commerce Clause that imposes meaningful and judicially-enforceable limits on national authority while still allowing very broad scope for national action.

Summary of Argument

This is a critical case for the Court's Commerce Clause jurisprudence. *United States v. Lopez*, 514 U.S. 549 (1995), demonstrated, for the first time since 1937, that the Commerce Clause has enforceable limits. And *United States v. Morrison*, 529 U.S. 598 (2000), entrenched the principle that Congress may not regulate acts that are noncommercial in character. But two doctrinal routes remain open to rob that principle of any force. One is to define the regulated "act" at such a high level of generality that it will always include some commercial applications. The other is to characterize every regulation of *noncommercial* activity as "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561. Both possibilities are open in this case. Unless the Court develops meaningful limits on each, *Lopez* and *Morrison* will be left as hollow shells.

The Government in this case has made the same error that it made in *Lopez* and *Morrison*: It has written a strong brief about what it *can* do, without leaving any room under its theory of the Commerce Clause for what it *cannot* do. The Commerce Clause has very broad scope, but there must be a limit. In *Lopez* and *Morrison*, the Government unsuccessfully defended a view of "substantial effects" on interstate commerce that, by "piling inference upon inference," *Lopez*, 514 U.S. at 567, stripped the Commerce Clause of any meaningful limit. The Government's

position in the present case is different in form but identical in result. The Government insists that the relevant regulated act for determining whether the regulation is commercial or noncommercial in character is "the overall class of activities covered by the [Controlled Substances Act]—the manufacture, distribution, and possession of controlled substances." Pet. Br. 36. But there are hardly any activities that Congress might seek to regulate that cannot be squeezed into a sufficiently general category that also includes commercial acts. Likewise, the Government insists not only that its regulation of noncommercial medical uses is part of a "comprehensive scheme" for regulating the commercial marijuana market, but that the courts must accept this assertion of necessity without any clear statement by Congress or factual foundation in the record. Needless to say, similar comprehensive scheme arguments could have been made in *Lopez* and *Morrison*, and if this Court reverses the Ninth Circuit, those arguments *will* be made in future to uphold any regulation that Congress might conceivably wish to undertake.

Judicial review is appropriate in Commerce Clause cases, notwithstanding the existence of political checks on national action. Such review, moreover, should not be so deferential to Congress as to amount to a rubber stamp. The practice of federal systems around the world belies the apparently widespread perception that judicial review of federalism issues is somehow unusual. On the contrary, the constitutional courts of Canada, Australia, Germany, and the European Union enforce limits on central power.

Viable doctrinal instruments are available to limit both the level of generality and comprehensive scheme problems under the Commerce Clause. The level of generality issue is actually a red herring, prompted by a common misinterpretation of *Wickard v. Filburn*, 317 U.S. 111 (1942), as involving noncommercial activity. The proper approach is simply to ask whether the *specific* activity subjected to federal regulation in the particular case is commercial

in nature. This case involves, after all, a challenge to the Controlled Substances Act *as applied* to Respondents' conduct. In any event, we think the considered decisions of Congress, California, and other states to regulate medical uses of drugs differently from nonmedical uses militates strongly in favor of evaluating the case at the lower level of generality.

Likewise, limiting principles can preserve an exception to *Lopez* and *Morrison* for regulation of noncommercial activity that is truly "essential" to a comprehensive federal regulatory scheme, without gutting the significance of those cases. Specifically, we argue that the Government should have to demonstrate that its judgment of necessity is plausible, that it has been clearly stated by Congress, and that it has an adequate foundation in the record. This approach hardly forecloses significant deference to Congress, but the Government has made no such showing here.

Argument

I. This Court should enforce limits on national authority under the Commerce Clause.

Federalism is one of the few areas of constitutional law where there is continuing debate about whether the relevant constitutional norms should be enforced by courts. While the signatories to this brief disagree on the extent to which certain aspects of federalism should be enforced through judicial review, we all agree that the Commerce Clause is one of the clear cases where judicial action is appropriate. To say this is neither to disregard "the political safeguards of federalism," Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), nor to urge that courts play a *primary* role in limiting national power. But this Court should not refuse to enforce the doctrine of enumerated powers or, what is much the same thing, apply a standard of review so deferential as to impose no

meaningful check. Moreover, to the admittedly contested extent that the practice of other nations is relevant, the boundary-enforcing role contemplated for courts in *Lopez* and *Morrison* is consistent with the role of courts in other federal systems around the world.

A. Cases concerning the limits of Congress's enumerated powers should not be left exclusively to the "political safeguards of federalism."

An intellectual tradition stretching back to James Madison's essays in The Federalist[3] emphasizes the States' representation in Congress as a check on national policies that threaten state prerogatives. But virtually all of that tradition's exponents – including Justice Blackmun, in his opinion for the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-51 (1985) – have emphasized "political safeguards" primarily as an argument against non-textual limits on national authority that operate *within* the scope of Congress's enumerated powers. *Garcia* drew a sharp distinction between judge-made limits like the *National League of Cities* doctrine and the boundaries of the enumerated powers set forth in Article I:

> *Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers*, the principal means chosen by the Framers to ensure the role of the States in the federal system lie in the structure of the Federal Government itself. *Id.* at 550 (emphasis added).

Other proponents of political checks have likewise reaffirmed the notion of enforceable limits on the enumerated powers.[4]

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[3] *See* The Federalist Nos. 45 & 46 (James Madison) (Clinton Rossiter, ed., 1961).

[4] Professor Wechsler argued that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the

To say that courts must enforce the limits of Congress's Article I powers is not, of course, to resolve how strict those limits should be. And the efficacy of non-judicial checks may well be relevant to the question of how much deference the Court should accord to Congress's judgments in support of commercial legislation. The case for a deferential standard of review has been undermined, however, by a broad body of scholarship, encompassing commentators of all ideological predispositions, criticizing the efficacy of the states' representation in Congress as a check on national aggrandizement.[5] In particular, many scholars have concluded that national politicians are likely to view state politicians as competitors rather than allies whose prerogatives are to be guarded from national encroachment.[6] Even more important, this Court has held, after extended consideration, that Members of Congress are *not* representatives of their state governments, but rather have a direct obligation to represent their constituents that is not mediated through state institutions. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821-22 (1995).

Our point is not that the "political safeguards of federalism" are always ineffectual, or even that judges are the *primary* guardians of state autonomy. Indeed, the inherent limitations on judicial review mean that states must rely on political checks to constrain national action on most issues, most of the time. The question is whether the judicial standard for evaluating Commerce Clause legislation should be so deferential as to entrust Congress with complete discretion. The basic point of *Lopez* and *Morrison* is this: If one proposes a form of Commerce Clause analysis under which one cannot imagine an act that would exceed Congress's authority, then that analysis must be wrong. This is particularly true in a case, like this one, where the issue of who may regulate implicates important human values – here, the choice of means to escape pain and suffering.

The balance to be struck – between undue judicial activism and abdication of the Court's responsibility – is difficult and delicate. Clearly *some* deference to congressional judgments is appropriate. But at the same time the Court may properly insist that those

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states . . . ." Wechsler, *supra*, at 559. But immediately before the sentence just quoted, Wechsler acknowledged that "[t]his is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well." *Id.* We read this passage as plainly distancing Wechsler from any sort of judicial abdication in enumerated powers cases.

Likewise, James Madison's discussion of political safeguards in Federalist 45 emphasized that "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined." Federalist No. 45, *supra*, at 292. And Chief Justice Marshall's statement in *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824), that "the sole restraints" on Congress's power are "[t]he wisdom and the discretion of Congress . . . and the influence which their constituents possess" presupposed that the exercise of power was "limited to specified objects" such as "commerce . . . among the several States." *Id.* at 197.

[5] The leading advocate of "political safeguards" today concedes that "Wechsler's theory is under siege," and that "subsequent experience and later developments have robbed his analysis of much, if not all, of its force." Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 218 (2000). Dean Kramer proposes a new version of "political safeguards" that relies on the operation of political parties and bureaucratic personnel to tie the interests of state and national policymakers together. *See id.* at 278-87. That theory has prompted searching criticism, *see, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112-117 (2001), and it has not gained anything approaching the widespread acceptance that Wechsler's account once commanded.

[6] *See, e.g.*, Baker & Young, *supra*, at 113-14; Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 374-75 (1997); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1357 (1997); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510-11 (1994).

judgments fall within broad but not undefined limits – that Congress's judgments have an adequate foundation and that they be clearly stated. "To make political safeguards of federalism work, some sense of enforceable lines must linger." Vicki Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?* 111 HARV. L. REV. 2180, 2228 (1998).

Finally, we submit that judges are not free to pick and choose which portions of the Constitution they will enforce, and that a decision to yield to the political process must be reconciled, in a principled way, with decisions to engage in more searching judicial review in other areas. The courts have enforced separation of powers principles, as well as "dormant" commerce limits on *state* regulation, notwithstanding the operation of strong "political safeguards" in those areas.[7] Objections to judicial enforcement of federalism have often sounded in judicial competence and the difficulty of formulating manageable judicial standards for limiting Congress's power. But similar competence objections have been rejected in areas posing comparable or even greater difficulties.[8]

The constitutional text plainly envisions the Commerce Clause as a binding limit on Congress. Chief Justice Marshall recognized that "should Congress . . . pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 423 (1819). "For the Court to declare, or be understood to declare, that 'federalism' limits are not judicially enforceable, creates a

[7] *See, e.g., Clinton v. City of New York*, 524 U.S. 417 (1998); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

[8] *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Baker v. Carr*, 369 U.S. 186 (1962); *see also Washington v. Glucksberg*, 521 U.S. 702, 765-73 (1997) (Souter, J., concurring in the judgment)

serious dissonance with understandings of the rule of law under American constitutionalism." Jackson, *supra*, at 2224.

B. Constitutional courts in federal systems around the world decide cases concerning the allocation of authority between the national and sub-national authorities.

Reluctance to enforce at least some aspects of federalism through judicial review is puzzling in light of comparative practice around the globe. Most federal systems envision a judicial role in the enforcement of constitutional boundaries between national and subnational authority. Indeed, this pattern is so prevalent that some European commentators have incorporated it into the very definition of federalism. Judge Koen Lenaerts, for instance, has stated that "[f]ederalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution *and umpired by the supreme court of the common legal order*." Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 263 (1990) (emphasis added).[9]

The European Court of Justice has long played a leading role in defining the balance between the European Union (and its predecessor, the European Community) and its Member States. Although for much of its history, the ECJ worked primarily to consolidate the Community's authority, it recently held that a Community directive exceeded the competence granted to the Community under its constitutive treaties. *See* Case C-376/98, Germany v. Parliament and Council (Tobacco Advertising), 2000 E.C.R. I-8419, [2000] C.M.L.R. 1175 (2000). In Germany, the Federal Constitutional Court is specifically empowered by statute to review disputes about the allocation of power between the national government and the Lander. That court recently ruled "in favor of

[9] *See also* Martin Shapiro, *The European Court of Justice*, in THE EVOLUTION OF EU LAW 321 (Paul Craig & Grainne de Burca eds., 1999).

strict judicial scrutiny of the requirements of Article 72, para. 2," which is the rough German equivalent of our Necessary and Proper Clause. Markus Rau, *Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the* Geriatric Nursing Act *Case*, 4 GERMAN L. 223, 223-24 (2003).

The Supreme Court of Canada enjoys statutory authority to hear cases concerning the powers of the national parliament, Supreme Court Act, R.S. ch. 8 § 53(1)(d) (1990), and it has affirmed that "it is the high duty of this court to insure that the legislatures do not transgress the limits of their constitutional mandate." *Amax Potash Ltd. v. Saskatchewan*, 2 SCR 576 (1976). The Australian High Court has similarly insisted that "upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised." *Ex Parte Boilermakers' Society of Australia*, 94 CLR 254 (1956). More recently, that court reaffirmed that "[t]he federal judiciary is responsible for determining the ambit of federal power." *Re Wakim*, 198 CLR 511 (1999).

There are important differences between these federal systems and our own, and one should hesitate before concluding that any particular rule or doctrine could be imported from one system to another. The point is simply that many federal systems accept and rely on judicial review as an important component of the structure. The proposition that *American* courts have an appropriate role to play in enforcing the boundaries of national power is typical rather than anomalous as a matter of comparative law.

II. Properly defined, the regulated activity in this case is not commercial in nature.

This case raises two unresolved questions under this Court's Commerce Clause cases. *Lopez* and *Morrison* held that Congress may regulate individual activities that substantially affect interstate commerce only in the aggregate, but only when the regulated

activity is commercial in nature. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 560-61, 567 (1995). The first key issue in the present case thus concerns how to define the regulated activity for purposes of this rule. The second issue arises from *Lopez*'s suggestion that Congress may regulate noncommercial acts when such regulation is "an essential part of a larger regulation of economic activity." 514 U.S. at 561. We deal with the former issue in this Part, the latter in Part III.

The most difficult aspect of this Court's distinction between commercial and noncommercial activity involves fixing the level of generality at which to evaluate the regulated activity. In this case, possession of marijuana generally may be an integral part of commercial activity, but possession solely for medical purposes as defined by California law is not. The appropriate analysis should focus on the specific activity engaged in by Respondents. On close examination, that is what this Court's precedents require; moreover, it is a more readily administrable rule than the alternatives.

If this Court elects to pursue a more open-ended analysis, the more specific level of generality is nevertheless the right one in this case. Choosing the "correct" level of generality is not easy, but it is made less difficult in this case by a crucial fact: Both Congress and California, as well as at least 15 other states, have chosen to regulate medical uses of drugs differently than non-medical uses. The Court should defer to that judgment and evaluate the constitutionality of the Controlled Substance Act specifically as it applies to the medical use of cannabis.

A. The correct analysis focuses on the specific activity before the Court in a particular case.

Wickard v. Filburn held that Congress may regulate activities that, considered individually, have minute effects on the national economy so long as, considered in the aggregate, the class of similar acts substantially affects interstate commerce. 317 U.S. 111, 125

(1942). Because virtually any conceivable human activity affects such commerce in the aggregate, *Wickard*'s aggregation analysis had the potential to remove all limits on Congress's authority. *Lopez* and *Morrison* were careful to insist that aggregation is only available where the regulated activity is itself commercial in nature. That move, however, raised the question whether the wheat production in *Wickard* was itself "commercial." The most common explanation is that while Filburn's own activity may *not* have been commercial – it is asserted that his wheat went simply to feed his family – it was part of a larger class of activity which is *usually* conducted for commercial purposes. *See* Pet. Br. 37.

This faulty account gives rise to the level of generality problem in this case. The Ninth Circuit majority asked whether possession of medical cannabis that has not been bought or sold – the class of activity carved out by California's medical use exemption – is commercial, and it answered that question in the negative. *See Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9th Cir. 2003). Judge Beam's dissent, on the other hand, asked whether marijuana consumption *in general* is commercial; unsurprisingly, he reached a different conclusion from that of the majority. *See id.* at 1238-39 (Beam, J., dissenting). These contrary results demonstrate, unfortunately, that judicial attempts to determine whether the general or the specific frame of reference "fits" better in any given case are likely to be subjective and unpredictable.

The Court can and should avoid this sort of indeterminate analysis, because the usual explanation for *Wickard* is wrong. Filburn's practice was "to sell a portion of his crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." 317 U.S. at 114. The sale of part of the crop, and the sale of the poultry and livestock fed on the wheat, were commercial activities in the ordinary sense. Seeding the next year's crop for the same purposes was part of the cycle of

commercial production. Only the wheat made into flour for home consumption was not sold in either its original or changed form. Moreover, the law at issue reached Filburn's wheat only because he disposed of it "by feeding in any form to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." *Id.* at 118-19. Thus, the government regulated Filburn because he sold the livestock that ate the wheat – not because he fed part of it to his family. Read in light of the facts and regulation actually at issue, the "consumption" in *Wickard* was consumption of raw materials for commercial production.

The specific activity giving rise to the prosecution in *Wickard* was thus commercial in its own right without any recourse to a broader class of activity. *Wickard* is not authority for analyzing the regulated activity at a higher level of generality, as the Government would have this Court do. The Court need not "choose" a level of generality; it should simply ask whether Respondents' own activities were commercial in nature.

Analyzing the case at a broader level of generality that does not reflect the facts would make the commerce power exceptionally difficult to limit. As Justice Thomas observed in *Lopez*, "one always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." 514 U.S. at 560 (Thomas, J., concurring). The Government's approach would mean that Congress could lump any non-market form of production in with production for market, so as to regulate the entire class. Congress could regulate the growing of geraniums in window boxes, where no sale or purchase ever takes place, simply because such activity falls within a broader class of "agricultural production" that also includes growing products for sale. Indeed, every form of household production is potentially a substitute for purchasing goods and services in a commercial transaction. Parents who cook dinner, clean house, and care for their children might instead have gone to a restaurant, hired a

cleaning service, or used a daycare center. Doing these chores for oneself is no doubt production, and no doubt has economic value; and all the parents who perform these chores for themselves no doubt have, in the aggregate, a substantial impact on the demand for commercial substitutes. But surely Congress cannot regulate these household chores under the commerce power. The Government cannot win this case simply by characterizing the growing of cannabis within the home as production.

The Court might try to prevent this sort of expansion by "choosing" the appropriate level of generality in a way that would limit the clause's scope, but we fear that endeavor would cast this Court adrift on a sea of difficulties. Virtually all activities can be evaluated at various levels of generality, as this Court's debates about the right to privacy have demonstrated.[10] In most cases, it will be extremely hard for courts to give a principled reason that one level of generality "fits better" than another. A far more determinate analysis will result from simply analyzing the activity actually presented to the Court in a concrete case.

This approach is consistent with the traditional distinction between as-applied and facial challenges. If Respondents had challenged the Controlled Substances Act on its face, then it would surely be appropriate to evaluate the commercial nature of the overall class of activity covered by the statute. The question before the Court, after all, would be whether the CSA has *any* (or at least a significant class of) constitutional applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). But Respondents have instead challenged the act as applied to them; it thus makes sense to ask

[10] *Compare, e.g., Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (defining the right in question as a right to commit homosexual sodomy), *with id.* at 199 (Blackmun, J., dissenting) (defining the right in question as a right of privacy in intimate personal relationships); *Michael H. v. Gerald D.*, 491 U.S. 110, 124-27 (1989), *with id.* at 141-42 (Brennan, J., dissenting).

whether *their* activity – growing their own cannabis for medical purposes without any buying or selling – is commercial. The Government's position in effect insists that Congress's acts are immune to as-applied challenges and that Respondents can only make a facial challenge to the CSA. That, however, contradicts the well-established teaching in this Court's cases that as-applied challenges are the norm. *See, e.g., United States v. Raines*, 362 U.S. 17, 20-22 (1960).

It is also important to distinguish the level of generality issue from *Wickard*'s key holding that a "substantial effect" on interstate commerce may be shown by aggregating the effects of individual acts. The prerequisite to aggregation is a showing that the regulated activity is itself "commercial" in nature, and the relevant activity for that purpose is the specific conduct of the person challenging the law. That argument is entirely consistent with aggregating the effects of many similar actions, for purposes of determining "substantial effect," if the action at issue is shown to be commercial. In this case, for instance, the Government must show that medical use of cannabis that is neither bought nor sold is "commercial"; if it can do so, then the Court should consider whether the aggregate effect of many such medical uses on commerce would be substantial.

Nor would adopting an as-applied analysis necessarily commit this Court to striking down federal restrictions on possession of drugs (or other items) anytime that the Government cannot show a prior or ultimate sale in the particular case. Many possession restrictions are justifiable as part of a "comprehensive scheme" of federal regulation aimed at commercial markets. That, of course, is the Government's other central argument in this case. *See infra* Part III. The practical reasons that Congress may want to reach noncommercial acts – like possession divorced from sale – are best dealt with under the "comprehensive scheme" rubric, which

emphasizes practical concerns, rather than by artificial conceptual expansion of the regulated activity at issue.

The "level of generality" analysis should stop here: Having challenged the CSA as applied to them, Respondents need show only that *their* activity is noncommercial in nature, whether or not the CSA may have constitutional applications to commercial activities in other contexts.

B. Medical uses of drugs are sufficiently distinct from non-medical ones to require separate analysis under the Commerce Clause.

Even if the Court pursues a more open-ended analysis, we think the "right" level of generality in this case is the more specific one. Congress has chosen, throughout the Controlled Substances Act, to treat medical uses distinctly from non-medical uses; so have the other eight states that permit medical cannabis use and others that have taken steps in that direction. *See* Resp. Br. 1 n.1. Even though these states and Congress disagree about whether cannabis itself has a valid medical use, they agree that valid medical uses – where they exist – are sufficiently distinct as to require separate treatment. Rather than "choose" a level of generality itself, this Court should defer to that consensus judgment.

The Government asserts that the relevant class of activities in this case involves "the overall class of activities covered by the CSA – the manufacture, distribution, and possession of controlled substances." Pet. Br. 36. As the Government acknowledges, the critical question under this approach is whether all forms of those activities are sufficiently similar that they "cannot be divorced from the general class of activities regulated by the CSA." *Id.* at 35-36.[11]

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[11] The Government also argues that, even if medical and non-medical uses are distinct classes of activity, the practical relationship between them requires that an effective regulatory scheme reach both. We consider that claim in Part III, *infra*.

Judge Pregerson correctly argued below for a narrower characterization of the relevant activity, 352 F.3d at 1228, but one need not rely on abstract analysis for that conclusion. Both the federal and the state statutory schemes reflect a judgment that medical and non-medical uses require distinct treatment.

It is important to distinguish between two questions. One is whether medical and non-medical uses are sufficiently similar, in terms of their bearing on *commerce*, to require unitary treatment. The second is whether cannabis *has* a legitimate medical use. There is a disagreement on the second question between Congress, which denies any medical applications for cannabis, and California and several other states, which believe such applications exist. But that should not obscure the basic agreement on the *first* question. The federal regulatory scheme, no less than the State's, treats medical uses differently from non-medical ones.

As the Government explains in its brief, drugs are listed in schedule I of the CSA if they have "'no currently accepted medical use.'" Pet. Br. 3 (quoting 21 U.S.C. § 812(b)(1)(B)). Drugs that do have such medical uses, however, are treated quite differently:

> [D]rugs listed in schedules II through V may be dispensed and prescribed for medical use. ManDufacturers, physicians, pharmacists and others who may lawfully produce, prescribe, or distribute drugs listed in schedules II through V must, however, comply with stringent statutory and regulatory provisions that control the manufacture and distribution of such drugs. 21 U.S.C. 821-829; 21 C.F.R. Pts. 1301-1306.

But such relationships often exist between highly varied sorts of activity. For example, the Government might plausibly contend that it cannot effectively regulate the market for illegal drugs without also regulating the content of drug education programs in schools, but no one would claim that such programs fall in the same class of activities as the illegal drug transactions themselves.

Pet. Br. 34. One of the basic reasons for differentiating between schedule I drugs and others is thus to treat medical uses differently from non-medical ones. True, Congress and California disagree about whether, in terms of the federal scheme, cannabis belongs on schedule I or somewhere on schedules II through V; Congress thinks that cannabis does not have a proper medical use, while California thinks it does. But this dispute of medical fact is not relevant to the key question of constitutional *power*, which turns on whether medical uses of a particular drug – if any there be – form a distinct class of activity from non-medical uses. The Controlled Substances Act reflects a judgment that they do.

Even if the federal scheme did not distinguish between medical and non-medical uses, however, it would remain relevant that a significant number of states, including California, view those classes of uses as sufficiently different to require separate treatment. That is not to suggest that the Court *must* defer to California's judgment that Congress may not constitutionally regulate medical cannabis; it is not even to say that California's choice should control the Court's analysis as to the appropriate level of generality at which to evaluate the case. But determining what constitutes a relevant class of activity for Commerce Clause purposes involves difficult judgments about the structure of regulation – judgments not easily made by courts. Where a government institution – like California and its eight sister states – has made a judgment on that question, that judgment ought to have some weight. The proposal to treat medical uses distinctly is not the *post hoc* rationale of a drug dealer's lawyer, but rather the regulatory policy of a sovereign state.

The primary objection to this sort of argument may be along the following lines: What is at issue in this case is the constitutionality of the *federal* statute; if that statute is within Congress's power, the position taken by *state law* on the same question is irrelevant. But our view is not that Congress's power depends on the position taken by state law; rather, we urge only that the state's considered

recognition of a distinct subset of the federally-regulated class ought to have some persuasive authority for a court trying to choose the appropriate analytical frame of reference. The whole notion of "political safeguards" for federalism announced by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and reinforced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is predicated on the *interaction* of state and national political actors. That model loses much of its vitality if courts must ignore the views of state institutions.

The Court should thus analyze whether the regulated activity, defined at the more specific level of medical use without any prior sale, is commercial. If it is *not*, then either of two different conclusions could plausibly follow. One is that Congress simply lacks power to regulate that subset of activity, and the statute is unconstitutional as applied. A second approach, however, would instead look back to the federal law and ask whether Congress specifically considered the narrower subset of activity and determined nonetheless to treat the broader class – here, all marijuana use – as a unitary activity.[12] This would be, in effect, a

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[12] This second approach would be analogous to this Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943), which held that the Sherman Act did not apply to certain actions authorized pursuant to state law, even assuming that those actions would otherwise have been unlawful under the federal statute. The Sherman Act did not expressly reach conduct authorized under state law, and the Court was reluctant to impute any such intent to Congress, out of respect for the sovereign authority of the States. *See id.* at 350-51. *Parker* is not on all fours with this case, but it does support taking into account the content of state law and the nature of state interests when this Court construes a federal statute. This Court's extensive use of other clear statement rules in a variety of contexts likewise supports construing federal law with respect for state policies. *See, e.g.*, *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (statutes subjecting states to liability); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (spending conditions); *United States v. Bass*, 404 U.S. 336, 349-50 (1971) (federal regulation of traditionally state crimes).

clear statement rule that would presumptively interpret the more general federal statute not to reach the narrower subset of noncommercial uses. *Cf. Gregory*, 501 U.S. at 460-61.[13] If Congress *did* specifically state its judgment that medical and non-medical uses of drugs form a unitary class, then the commercial nature of the regulated act could be analyzed more generally. But the CSA supports the opposite reading.

The most compelling argument for the position offered here is the difficulty of the alternative. If the Court is to decide cases under the commercial/noncommercial distinction adopted in *Lopez* and *Morrison*, and if the Court eschews the simpler rule focusing on the specific conduct at issue in the case, then there is no escape from the need to define the class of activity being regulated. One might, of course, simply defer to Congress, but that would be tantamount to removing all limits on the Commerce Clause. Congress could override the results in *Lopez* and *Morrison*, for example, simply by regulating at the most general level of "guns" or "violent crime." If the reviewing court cannot look to the only other available external source – the policy choice embodied in state law – then the court will be thrown back on its own subjective judgments about the "best" level of generality at which to evaluate the case. That is no recipe for objectivity or predictability in the law.

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[13] This case raises serious statutory questions as to whether Congress meant to reach the specific activity at issue. *See* Resp. Br. 42-45. This Court had no occasion, in *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001), to decide whether Congress intended to preclude a medical necessity defense asserted by *patients*, as opposed to those who supplied them with cannabis. *Id.* at 494. Deciding that question in the negative would not only accord with the presumption against preemption, *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), but also avoid the constitutional questions whether regulating such use exceeds the commerce power or infringes a due process right to pain relief, *see Washington v. Glucksberg*, 521 U.S. 702, 745 (1997) (Stevens, J., concurring in the judgment).

Finally, this approach has the virtue of distinguishing other difficult cases that currently seem headed to this Court in a way that reflects the underlying values associated with federalism. Considering a state's decision to define the relevant regulated act at a lower level of generality distinguishes those cases in which the state government has chosen to pursue a distinct policy choice from those in which it has expressed no policy interest. The former situation is much more likely than the latter to implicate the values of policy diversity and experimentation that this court has associated with federalism. *See Gregory*, 501 U.S. at 458.[14] In *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), for example, the Ninth Circuit has invalidated 18 U.S.C. § 2252(a)(4)(B), a statute prohibiting possession of child pornography, on the ground that it reaches acts that are noncommercial in nature. There is no evidence, however, that the State of California has recognized any distinct subclass of pornography as warranting different treatment – or, indeed, that California has expressed any interest in pornography that diverges from federal policy. There is no reason, then, to define the relevant act in that case at any level other than the general one selected by Congress. We of course take no position on the appropriate outcome in *McCoy*, should it reach this Court. Our point is simply that cases in which the state government has articulated a distinct policy of its own most directly implicate federalism's underlying values, and that a doctrinal analysis that takes those state policies into account is better able to track those values than one which does not.

At the end of the day, this case involves household production for household consumption, with no sales or prospect of sales. If the Government can regulate that, it can regulate anything. That is the narrowest ground of decision here.

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[14] *See also* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541 (2002).

III. Regulation of medical cannabis is not "an essential part of a larger regulation of economic activity."

Even if the relevant act regulated by federal law is not itself commercial in nature, this Court has said that Congress may reach it if doing so is "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561. The Government has seized on this exception as a basis for regulating medical cannabis as part of a "comprehensive scheme" to restrict the trade in illicit drugs. The "comprehensive scheme" exception has the potential to swallow up the principle that Congress generally may not regulate noncommercial activities under the Commerce Clause. This case requires this Court to develop an account of the "comprehensive scheme" exception that does not lead to that result.

Two distinct limits on the "comprehensive scheme" exception may be extrapolated from this Court's decisions. The first focuses on process: *Congress*, not the Government's lawyers *post hoc*, should have to make the judgment of necessity, and that judgment should be clearly reflected in either the statute itself or the legislative record. The second limit is substantive: Congress's judgment that reaching noncommercial activity is necessary to a broader regulatory scheme should have an adequate foundation, as determined by the reviewing court. This determination should, and perhaps of necessity must, be deferential. But the court's analysis must not be so deferential as to foreclose meaningful review.

A. The "comprehensive scheme" exception must be narrowly construed.

The "comprehensive scheme" notion has its roots in decisions like the *Shreveport Rate Cases*, 234 U.S. 342 (1914), which recognized that sometimes subject matter within the Commerce Clause (there, railroad rates on traffic that crossed state lines) cannot be effectively be regulated without also reaching matter falling outside the Clause (e.g., railroad rates for *intra*state traffic). That

sort of judgment gives meaning to the Necessary and Proper Clause in Commerce Clause cases. The distinction in *Lopez* and *Morrison* between commercial and noncommercial activity already incorporates this principle to a much greater degree than did the Court's pre-1937 cases. After all, modern doctrine no longer distinguishes between *inter*state and *intra*state commerce, presumably on the theory that in an integrated national economy, the power to reach *intra*state commercial activity will almost always be necessary and proper to effective regulation of *inter*state commerce. The question is how much further this necessity principle is to be taken.

What seems principally to have divided the Court in *Lopez* and *Morrison* was the question whether noncommercial activity that "substantially affects" commerce can likewise be reached on a necessity rationale. The Government argued (and the dissenters agreed) in *Lopez* that the noncommercial act of bringing a gun to school must be regulated in order to protect the national economy from problems associated with poor schooling. *See* 514 U.S. at 563-64; *id.* at 620-22 (Breyer, J., dissenting). Likewise, in *Morrison*, the Government argued (and the dissenters agreed) that many forms of noncommercial violence against women must be regulable because they threaten the national economy, including efforts to regulate that economy so as to facilitate women's participation in it. *See* 529 U.S. at 615; *id.* at 634-36 (Souter, J., dissenting). The noncommercial acts in those cases surely had those effects, as a factual matter. The majority's answer instead was that *all* human activities have similar effects, and that to accept a pure "substantial effects" rule under modern conditions would leave the Commerce Clause without any limiting principle at all. *See Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 564.

A broad version of the "comprehensive scheme" exception would fatally undermine the resolution of this issue in *Lopez* and *Morrison*. At bottom, the Government's view of that exception is

simply a repackaged version of the claim that noncommercial acts can be regulated if they have *effects* on commercial ones. The Government argues, for example, that the existence of a legal use for cannabis would create problems of proof in establishing that any given marijuana cache seized by government officers was intended for *illegal* use. In other words, the noncommercial activity of home-grown medical use has an *effect* on the illegal market for marijuana, making that market harder to regulate. But by insisting that Congress may reach any noncommercial act that affects regulation of commercial activity, the Government flatly rejects this Court's holdings in *Lopez* and *Morrison*.

Indeed, it is not hard to come up with plausible "comprehensive scheme" arguments to uphold the statutes struck down in those two cases. Certainly the federal gun laws entail a "comprehensive scheme" for the regulation of firearms, and the Government could reasonably have characterized the Gun Free School Zones Act, 18 U.S.C. § 922(q), as part of that scheme. It might have said, for instance, that the federal gun laws are concerned with the possession of guns by minors, and that schools are a place where distribution of guns to minors is particularly likely to take place. And because it is always difficult to catch people in the act of sale itself, possession laws are a necessary supplement to distribution restrictions.

Likewise, in *Morrison*, the Government might have said that one of the primary achievements of federal regulation has been the opening of job opportunities for women under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e), and that the purposes of that and other valid federal statutes are undermined when women are deterred or incapacitated from entering the work force. Violence against women plainly does deter or incapacitate many women from taking advantage of employment opportunities created in part by federal law. Hence, the Government might have said that the Violence Against Women Act, 42 U.S.C. § 139817, was needed as part of a comprehensive scheme to facilitate the equal participation of women in the workforce.

One might respond to this latter argument by accepting a purely formal limitation on the "comprehensive scheme" principle. The VAWA, after all, was not actually enacted in connection with Title VII or other laws designed to ensure workplace equality. But that is hardly much of a limit; the argument suggests that Congress could reenact these laws simply by repackaging them as amendments to other statutes. More important, the formal conception ignores the frequently incremental way that the Congress actually enacts legislation. Different elements of a "comprehensive scheme" are typically enacted at different times under different names; the federal "scheme" to promote gender equality in the workplace, for instance, surely encompasses not only Title VII but also the Equal Pay Act, 29 U.S.C. § 206(d), the Family Medical Leave Act, 29 U.S.C. § 2601 et seq., and possibly other laws. If the "comprehensive scheme" principle is to be contained, this purely formal approach will not do.

This Court's decisions suggest two different limits, one focusing on process and the other on substance. The process principle insists that the necessity be grounded in Congress's actual purposes and judgments. Although Congres may regulate commercial activity for any purpose it likes, *see United States v. Darby*, 312 U.S. 100, 114 (1941), the Court has been more wary of "pretextual" purposes under the Necessary and Proper Clause, *see McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 423 (1819). At the very least, necessity claims should be grounded in the actual purpose motivating Congress's invocation of the commerce power. Moreover, Congress itself should have to make the judgment that reaching noncommercial activity is necessary. The "political safeguards of federalism" are important but limited, and courts have a role in ensuring that those safeguards play their intended role. In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of*

Engineers, 531 U.S. 159 (2001), for example, this Court held that the decision to regulate at the outer limit of the commerce power must come from *Congress*, not from an administrative agency.

The substantive limit builds on *Lopez*'s definition of the "comprehensive scheme" exception as limited to situations in which the regulation of noncommercial acts is necessary as "an essential part of a larger regulation of economic activity." 514 U.S. at 561. Congress's judgment of necessity should receive some deference, but that deference cannot be absolute unless this Court is prepared to abandon the limits announced in *Lopez* and *Morrison*. *Lopez* framed the "comprehensive scheme" principle in quite restrictive terms, stating that the regulation of noncommercial activity must be "an *essential* part of a larger regulation of economic activity." 514 U.S. at 561 (emphasis added). That wording suggests something stronger than the deferential means/ends standard generally applied under the Necessary and Proper Clause. Indeed, in *McCulloch*, Chief Justice Marshall made much of the absence of any word like "essential" in that clause. 4 Wheat. (17 U.S.) at 418-19. And, as already noted, the Court's move from *interstate* commerce to mere commercial activity already stretches Congress's Necessary and Proper authority.

Determining what must be included in a "comprehensive scheme" of regulation will, of course, entail some factual and policy judgments that are primarily within Congress's competence. At a minimum, however, the courts should insist that those judgments have some reasonable basis in fact. Such a requirement would be consistent with this Court's treatment of the legislative record in *Lopez* and *Morrison*, in which both the majority and dissenting opinions agreed that the role of legislative findings is to assist the Court in determining *for itself* the reasonableness of Congress's judgment of economic effects. *See Lopez*, 514 U.S. at 562-63; *id.* at 616-17 (Breyer, J., dissenting); *Morrison*, 529 U.S. at 614; *id.* at 628 (Souter, J., dissenting).

B. This Court should reject the "comprehensive scheme" argument in this case because it does not reflect Congress's own judgment and because it lacks an adequate foundation in the record.

The Government can meet neither the process nor the substantive standard in this case. On the process side, the linkages drawn between medical and non-medical uses bear only a tenuous relationship to the likely purposes of the CSA. The Government has argued, for example, that medical cannabis may substitute for other painkillers, thereby affecting the market for those drugs. But that effect is relevant only if Congress's purpose in regulating that second market has to do with *prices*; in *Wickard*, for example, Congress was centrally concerned with supporting the price of wheat, and it was therefore important to regulate home-grown wheat production that would trade off with purchases in the commercial market. *See* 317 U.S. at 128-29. There is no evidence in the present case that the United States seeks to support the price of cannabis – or any substitute pain reliever – in the commercial market.

Similarly, the judgment of necessity that would permit regulation of noncommercial activities is far from evident in the text, structure, or legislative history of the statute. The Government's brief suggests various ways in which permitting medical uses *might* undermine drug enforcement efforts in the commercial office, but there is very little evidence that Congress had any of these points in mind when it enacted the Controlled Substance Act. The most plausible account of that Act is that Congress chose to prohibit all marijuana use not because it thought about whether medical uses would undermine regulation of the commercial market, but because it simply believed there were *no* valid medical uses. That is a judgment reasonable people differ on, but it has nothing to do with necessity.

The Court should also review the substance of the necessity determination. This Court has been skeptical of arguments that the

Government must be allowed to restrict activity that it could not otherwise constitutionally reach, simply because such action would facilitate the enforcement of other valid regulations. In this case, for example, the Government has argued that the mere existence of legal medical uses for cannabis would create evidentiary difficulties for recreational-use prosecutions, because prosecutors would be forced to prove that the defendant lacked a medical reason for his use. That argument is remarkably similar to an argument made by the Government, and rejected by this Court, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In that case, the Government defended a prohibition on "virtual" child pornography on the ground that it would be difficult to prove in court that real child pornography – which the Government has validly banned – was not virtual in its origin. The Court subjected that claim to searching scrutiny and emphatically rejected it. *See id.* at 254-55.[15]

Second, the necessity judgment is a practical one, and it should not be indifferent to the content of *state* law for the same reasons we discussed in Part II. Many of the Government's arguments, however, completely ignore the fact that the State of California has also regulated medical cannabis use here.[16] The government claims that barring Congress from restricting noncommercial medical uses would mean that "persons operating intrastate could function essentially as unregulated and unsupervised drug manufacturers and pharmacies." Pet. Br. 34. This assertion ignores, of course, the fact that the "federal controls Congress put in place under the CSA," *id.*, are not the only regulation in the picture. California itself extensively regulates the medical use at issue here, *see* Resp. Br. 1-2 & n.2, and the competence of state governments to regulate conduct falling outside the scope of Congress's enumerated powers is a basic assumption of our Constitution.

By contrast, the case for federal regulation of noncommercial acts as part of a "comprehensive scheme" will often be stronger where there is no relevant state regulation. The Government argues, for instance, that the mere existence of lawful uses for cannabis will make it more difficult to prove, in any given prosecution, that the use at issue was *un*lawful. That is highly implausible in light of California's scheme, which permits qualified patients who satisfy the requirements for medical use to obtain ID cards demonstrating the lawfulness of their conduct under state law, *see* Resp. Br. 2 n.2; the presence or absence of a lawful medical use thus is not only readily provable in court, but also readily demonstrable to law enforcement officers in the field. But the Government's argument is more powerful as applied to *recreational* users who have neither purchased nor transported their marijuana. Whether or not their possession is "commercial" in nature, the absence of any measures under state law to license and readily identify such purely intrastate uses gives rise to a far stronger argument for inclusion of such conduct within the federal regulatory scheme.

Finally, while reviewing whether the Government's necessity arguments have an adequate foundation is not easy, the Court need not define the precise contours of such review in this case. The matter is here on appeal from the Ninth Circuit's determination that Respondents were entitled to a preliminary injunction. There has

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[15] *Free Speech Coalition* was, of course, a First Amendment case, and we do not argue that the standard of review should be the same here. We do note that conduct falling outside the Commerce Clause is constitutionally protected from *federal* regulation much as expressive conduct is. Indeed, the reason that free speech and other individual rights protections were not included in the original Constitution was that, in the Federalists' view, Congress had not been given *enumerated* power to reach the conduct later protected by express rights. *See* The Federalist No. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[16] It is unclear what the Government means when it repeatedly says that the CSA is a "closed system" of drug regulation, but the most natural meaning – that Congress has preempted the field of drug regulation – is plainly untrue. No one disputes, for instance, that California is entitled to enforce its own laws *restricting* the use of drugs covered by the CSA.

been no trial in which the Government might develop the factual basis for its judgment that regulating medical cannabis is an "essential part of a larger regulation" of the illegal drug market. It will be easier to develop standards for judicial review of such a record once the Court can see what such a record might look like. In order to decide this appeal, this Court need only decide that some factual showing is necessary and that no such showing has yet been made.

Conclusion

The judgment of the U.S. Court of Appeals for the Ninth Circuit remanding for entry of a preliminary injunction should be affirmed.

Respectfully submitted,

Charles Fried
David L. Shapiro
1575 Massachusetts Ave.
Cambridge, MA 02138

Steven G. Calabresi
357 E. Chicago Avenue
Chicago, IL 60611

Ilya Somin
3301 North Fairfax Dr.
Arlington, VA 22201

Douglas Laycock
Ernest A. Young
Counsel of Record
727 E. Dean Keeton St.
Austin, TX 78705
(512) 232-5561

Matthew D. Schnall
Rachel H. Sommovilla
Bingham McCutchen LLP
150 Federal St.
Boston, MA 02110-1726

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